

Sent: Wed 3/17/2010 2:53 PM
From: Joel Bard [JBard@k-plaw.com]
To: Tucker, Jonathan; Bagg, Jeffery
Cc: Shaffer, Larry
Re: FW: Amherst Citizen Zoning Petition (question)

Hi Jonathan and Jeff:

You have requested an opinion regarding the legality of the definition of “family” set forth in Section 12.14 of the Zoning Bylaw. In my opinion, Section 12.14 of the Zoning Bylaw does not infringe on any right protected by the United States or Massachusetts Constitutions. In my further opinion, a group of unrelated individuals have no constitutionally protected right to live together.

Section 12.14 of the Zoning Bylaw defines “family” as:

- 12.140 An individual residing in one dwelling unit; or
- 12.141 A group of persons related by marriage, blood and/or adoption residing together in one dwelling unit; or
- 12.142 A group of unrelated individuals, not to exceed 4, residing cooperatively in one dwelling unit.
In this instance, an accessory use as described in Sections 5.010 and 5.011 is not permitted.

You have informed me that a group of citizens has filed a petition to amend Section 12.142 to delete the words “not to exceed 4,” which would eliminate any limitation on the number of unrelated individuals that can share one dwelling unit.

In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (“Belle Terre”), the United States Supreme Court upheld a zoning ordinance limiting the occupancy of single-family dwellings to no more than two unrelated people. A group of six unrelated students living together challenged the ordinance on equal protection grounds, among other things. In holding that the ordinance was constitutional, the Court found that the ordinance did not involve the deprivation of any fundamental right guaranteed by the Constitution and bore a rational relationship to a permissible state objective (“A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.”).

Three years later, in Moore v. City of East Cleveland, 431 U.S. 494 (1977) (“Moore”), the U.S. Supreme Court distinguished its holding in Belle Terre when it struck a zoning ordinance which prohibited certain non-nuclear family members from living together (in the Moore case, a grandmother could not live in a house with her son and two grandsons, who were cousins but not brothers). In upholding the right of non-nuclear family members to live together, the Moore Court distinguished the case from Belle Terre because the ordinance in Belle Terre affected only unrelated individuals while the East Cleveland ordinance targeted certain categories of relatives who may live together and declared that others may not. Even though the ordinance was aimed at goals which the Court found were legitimate (preventing overcrowding, minimizing traffic and parking congestion, and avoiding undue financial burden on the city’s school system), the Court concluded that the ordinance served these interests marginally, at best, and improperly intruded on protected choices concerning family living arrangements. See also City of Worcester v. Bonaventura, 56 Mass.App.Ct. 166 (2002) (holding that “lodging house” ordinance which prevents condominium owners from renting to four or more unrelated college students is not unconstitutionally vague); Commonwealth v. Jaffee, 398 Mass. 50 (1986) (holding that use of house by eight unrelated adults who evidence a complete lack of communal living—including separate kitchens, mailboxes and leases—does not fall within a reasonable judicial construction of “one family”).

In the email to me, Jeff noted that in 2006 the Attorney General's Office rejected an amendment to the definition of "family" in the Town of Milford's Zoning Bylaw. The proposed amendment to the Milford Zoning Bylaw would have changed the definition of "family" to expressly exclude "a group of more than three (3) persons who are not within the second degree of kinship." The Attorney General disapproved the Bylaw amendment because the Bylaw's restriction to three of the number of persons in a household who are not within the second degree of kinship would infringe constitutionally guaranteed family relations rights. In so doing, the Attorney General cited Moore v. City of East Cleveland for the proposition that the Fourteenth Amendment's Due Process Clause protects an extended family's choice to live together. The Milford case highlights the key difference in the analysis—whether a zoning bylaw attempts to limit the number of related versus unrelated persons living together. While attempts to limit the former violate constitutionally protected liberty interests, the latter does not.

As indicated above, the standard of review in these cases requires that the zoning regulation bear a rational relationship to permissible governmental objectives. In my opinion, limiting the number of unrelated individuals who may live together to four, as the Zoning Bylaw currently does, would further a legitimate governmental objective of minimizing concerns related to noise, traffic and overcrowding, and would not implicate matters of "family choice" protected by state and federal law.

Finally, I saw from the information you sent me that you have prepare two "alternative" versions of the Section 12.14 "family" definition, one which sets forth characteristics for being considered a "functional family unit," and one which specifically targets groups of college students and is modeled after the Boston Zoning Code. Although you did not ask me to review these proposed amendments, I would caution you against getting too specific in distinguishing between certain groups of unrelated individuals who may live together and those who may not. Targeting certain groups, such as undergraduate students, but not other similar groups, such as graduate students, for example, could, in my opinion, expose the Bylaw to an equal protection challenge. If you would like me to review either of these alternative versions in greater detail, please let me know.

If you have any further questions regarding this matter, please do not hesitate to contact me.

Joel

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